COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Investigation by the Department of Telecommunications and Energy to establish a surcharge to recover prudently incurred costs associated with the provision of wireline enhanced E911 services, relay services for TDD/TTY users, communications equipment distribution for people with disabilities, and amplified handsets at pay telephones.	D.T.E. 03-63, Phase II

HEARING OFFICER RULING ON VERIZON MASSACHUSETTS' MOTION FOR CONFIDENTIAL TREATMENT

March 3, 2004

I. INTRODUCTION

On July 14, 2003, the Department of Telecommunications and Energy ("Department") issued an Order establishing a monthly interim surcharge of $0.85 per residential and business retail line to pay for the cost of E911 and disability access programs in Massachusetts. E911/Disabilities Access Surcharge, D.T.E. 03-63-Phase I (2003) ("Interim Surcharge Order"). In the Interim Surcharge Order, we directed Verizon New England, Inc. d/b/a Verizon Massachusetts ("Verizon") to conduct an independent audit of its residential directory assistance revenues and E911/disabilities access program costs. Id. at 19. The Department required Verizon to (1) submit its draft request for proposals ("RFP") for approval, and (2) submit the responses received with a recommendation of auditor, and the Department would select an auditor. Id. The Department also allowed Verizon to charge the cost of the audit as an expense to the residential directory assistance fund. Id.

On August 13, 2003, Verizon filed a draft RFP for the audit, and the draft RFP was amended and refiled on October 10, 2003. On October 23, 2003, the Department approved Verizon's amended RFP. Verizon issued its RFP, and received four bids on December 22, 2003. On February 4, 2004, Verizon filed four bids with the Department, along with a recommendation of auditor. On February 12, 2004, Verizon filed a motion for confidential treatment of the bids and Verizon's recommendation ("Motion"). No party opposed Verizon's Motion.

II. STANDARD OF REVIEW

Information filed with the Department may be protected from public disclosure pursuant to G.L. c. 25, § 5D, which states in part that:

> The [D]epartment may protect from public disclosure, trade secrets, confidential, competitively sensitive or other proprietary information provided in the course of proceedings conducted pursuant to this chapter. There shall be a presumption that the information for which such protection is sought is public information and the burden shall be upon the proponent of such protection to prove the need for such protection. Where such a need has been found to exist, the Department shall protect only so much of the information as is necessary to meet such need.

G.L. c. 25, § 5D permits the Department, in certain narrowly defined circumstances, to grant exemptions from the general statutory mandate that all documents and data received by an agency of the Commonwealth are to be viewed as public records and, therefore, are to be made available for public review. See G.L. c. 66, § 10; G.L. c. 4, § 7, cl. twenty-sixth. Specifically, G.L. c. 25, § 5D, is an exemption recognized by G.L. c. 4, § 7, cl. twenty-sixth (a) ("specifically or by necessary implication exempted from disclosure by statute").

G.L. c. 25, § 5D establishes a three-part standard for determining whether, and to what extent, information filed by a party in the course of a Department proceeding may be protected from public disclosure. First, the information for which protection is sought must constitute "trade secrets, [or] confidential, competitively sensitive or other proprietary information;" second, the party seeking protection must overcome the G.L. c. 66, § 10, statutory presumption that all such information is public information by "proving" the need for its non-disclosure; and third, even where a party proves such need, the Department may protect only so much of that information as is necessary to meet the established need and may limit the term or length of time such protection will be in effect. See G.L. c. 25, § 5D.

Previous Department applications of the standard set forth in G.L. c. 25, § 5D reflect the narrow scope of this exemption. See Boston Edison Company: Private Fuel Storage Limited Liability Corporation, D.P.U. 96-113, at 4, Hearing Officer Ruling (March 18, 1997) (exemption denied with respect to the terms and conditions of the requesting party's Limited Liability Company Agreement, notwithstanding requesting party's assertion that such terms were competitively sensitive); see also, Standard of Review for Electric Contracts, D.P.U. 96-39, at 2, Letter Order (August 30, 1996) (Department will grant exemption for electricity contract prices, but "[p]roponents will face a more difficult task of overcoming the statutory presumption against the disclosure of other [contract] terms, such as the identity of the customer"); Colonial Gas Company, D.P.U. 96-18, at 4 (1996) (all requests for exemption of terms and conditions of gas supply contracts from public disclosure denied, except for those terms pertaining to pricing).

All parties are reminded that requests for protective treatment have not and will not be granted automatically by the Department. A party's willingness to enter into a non-disclosure

agreement with other parties does not resolve the question of whether the response, once it becomes a public record in one of our proceedings, should be granted protective treatment. In short, what parties may agree to share and the terms of that sharing are not dispositive of the Department's scope of action under G.L. c. 25, § 5D, or c. 66, § 10. See Boston Edison Company, D.T.E. 97-95, Interlocutory Order on (1) Motion for Order on Burden of Proof, (2) Proposed Nondisclosure Agreement, and (3) Requests for Protective Treatment (July 2, 1998).

III. VERIZON'S MOTION

Verizon requests that the Department grant confidential treatment to (1) the competitive bids received by Verizon in response to its RFP, and (2) its recommendation regarding the selection of an independent auditor (Motion at 1). According to Verizon, the data qualifies as a trade secret, or confidential, competitively sensitive, proprietary information under Massachusetts law and it entitled to protection from public disclosure, and that such confidential treatment is consistent with the nature of the competitive bidding process (id.).

Regarding the bids received by Verizon, Verizon alleges that those bids contain detailed information about each bidder's work plans, methods and procedures, qualifications, and pricing and fees (id. at 3). Verizon contends that confidential treatment of bid data is appropriate given the competitive nature of the bid process, and will ensure that Verizon obtains best value for its RFP (id.). Disclosure of bid data, according to Verizon, may result in less advantageous terms or higher costs for Verizon for the work to be performed (id. at 4). Finally, Verizon maintains that its interest in preserving the confidentiality of bid information far outweighs any public interest in disclosure, and that the Department has granted confidential treatment to bid information and supplier agreements in various proceedings (id.). Regarding Verizon's recommendation of auditor, Verizon argues that it has reviewed the bids and provided the Department with its recommended auditor, and therefore the Department should afford the same confidential treatment to the recommendation as to the underlying data on which the recommendation is based (id. at 3).

IV. ANALYSIS AND FINDINGS

The Hearing Officer agrees with Verizon that disclosure of bid information for this audit could adversely affect the competitive bidding process by constraining Verizon's bargaining position, or discouraging potential bidders thereby reducing Verizon's options. This lessening of Verizon's position could result in less advantageous pricing and terms for audit services. Where the Department has allowed Verizon to recover the cost of the audit in its permanent E911 surcharge to be paid by subscribers, it is important that Verizon obtain value for its audit expenses.

Furthermore, the Department has granted confidential treatment in other proceedings to information similar to information contained in the bids. See Colonial Gas Company, D.P.U. 96-18, at 3-4 (1996) (supplier price and cost information protected from disclosure); Berkshire Gas Company, D.T.E. 99-81, at 6-9 (1999) (prices and negotiated terms protected). In addition, the Department has protected company methods and procedures from public disclosure. See Media One/Bell Atlantic Arbitration, D.T.E. 99-42/43, 99-52, at 51, Order on Motions for Reconsideration et al. (March 24, 2000). The Department has also protected an auditor work program. See Authority to Enter In-Region Inter-LATA Market, D.T.E. 99-271, Hearing Officer Ruling on Motion for Confidential Treatment (November 7, 2002).

Regarding the names of the bidders, or the name of the firm Verizon recommends as auditor, the Hearing Officer finds that Verizon has not proven why this information is the type of information that should appropriately be protected under G.L. c. 25, § 5D. Specifically, Verizon has not explained how disclosure of the names of the bidders, or the name of the bidder it recommends, will harm Verizon in the current or future competitive procurement. While Verizon lists the "detailed information" contained in each bid as support for its Motion, it does not include the identity of the bidder in that list. The Hearing Officer notes that although the Department has protected vendor pricing information, see Unbundled Network Element Rates, D.T.E. 01-20, Hearing Officer Ruling on Motion for Confidential Treatment (December 21, 2001), the Department has denied requests for confidential treatment of supplier names. See e.g., Bay State Gas Company, D.P.U. 94-16, at 3-7 (1994). Therefore, the Hearing Officer denies Verizon's Motion regarding the names of the bidders, and the name of the firm that Verizon recommends as auditor.

V. RULING

Accordingly, the Hearing Officer finds that Verizon has provided sufficient reasons to protect the contents of the competitive bids received for this audit and its recommendation (insofar as its recommendation reflects the contents of the competitive bids) in accordance with G.L. c. 25, § 5D, and hereby grants Verizon's Motion for Confidential Treatment for this information. However, Verizon has not proven how the names of the bidders, or the name of its recommended auditor, consist of the type of information to be protected under G.L. c. 25, § 5D, and therefore the Hearing Officer denies Verizon's Motion as to the names of the bidders and the name of Verizon's recommended auditor.

Under the provisions of 220 C.M.R. § 1.06(6)(d)(3), any aggrieved party may appeal this Ruling to the Commission by filing a written appeal with supporting documentation by March 4, 2004.[1] A copy of this Ruling must accompany any appeal. Responses to any appeal must be filed by March 10, 2004.

March 3, 2004 _____/s/_____
Date Joan Foster Evans
Hearing Officer

cc: Mary L. Cottrell, Secretary
Andrew O. Kaplan, General Counsel
Paula Foley, Assistant General Counsel
Michael Isenberg, Director, Telecommunications Division
April Mulqueen, Assistant Director, Telecommunications Division
Service List

[1] The time for appeal has been shortened in order to accommodate Verizon's requested due date for the Department to issue its selection of auditor.